

No. 14900

**United States
Court of Appeals**
for the Ninth Circuit

R. N. B. CONVERSE, Doing Business as Converse
Trucking Service, and CHESTER A. BOYLE,
Appellants,
vs.

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Oregon**

FILED

JAN 25 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

KOERNER, YOUNG, McCOLLOCH & DEZEN-
DORF,

JOHN GORDON GEARIN,

OGLESBY H. YOUNG,

800 Pacific Building,

Portland 4, Oregon,

For Appellants.

R. B. MAXWELL,

B. J. GODDARD,

538 Main Street,

Klamath Falls, Oregon,

For Appellee.

In the United States District Court for the
District of Oregon

Civil No. 7493

CONSOLIDATED FREIGHTWAYS, INC., a Corporation,

Plaintiff,

vs.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES, a Corporation;
LUISOTTI BROTHERS, a Partnership; and
CHESTER A. BOYLE,

Defendants.

PETITION FOR REMOVAL

Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, for the purpose of presenting this petition, show that heretofore and on or about the 23rd day of April, 1954, Consolidated Freightways, Inc., a corporation, as plaintiff, brought this action against said defendants in the Circuit Court of the State of Oregon for the County of Klamath.

Defendants, and each of them, at the time of the commencement of said action, were and now are citizens and residents of the State of California and non-residents of the State of Washington. Plaintiff, Consolidated Freightways, Inc., a corporation, at the

time of the commencement of said action was and now is a corporation created under and existing under and by virtue of the laws of the State of Washington and at all of said times was and now is a citizen and resident of that state and a non-resident of the State of California.

This action is one of a civil nature in which there is a controversy between citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

Attached hereto as Exhibits "A" and "B," respectively, are copies of summons and complaint served on Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle in said action in said Circuit Court.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Defendants, Converse Trucking Co.,
Also Known as Converse Trucking Service, a
Corporation; Sacramento Freight Lines, a Cor-
poration, and Chester A. Boyle.

Duly Verified.

EXHIBIT "A"

In the Circuit Court of the State of Oregon
for the County of Klamath

CONSOLIDATED FREIGHTWAYS, INC., a Corporation,
Plaintiff,

vs.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES, a Corporation;
LUISOTTI BROTHERS, a Partnership, and CHESTER A. BOYLE,
Defendants.

SUMMONS

To Converse Trucking Co., Also Known as Converse
Trucking Service, a Corp.; Sacramento Freight
Lines, a Corp.; Luisotti Brothers, a Partnership,
and Chester A. Boyle, Defendants.

In the Name of the State of Oregon:

You are hereby required to appear and answer
the complaint filed against you in the above-entitled
cause within ten days from the date of service of this
summons upon you, if served within this county; or
if served within any other county of this state, then
within twenty days from the date of the service of
this summons upon you; or if served outside the
State of Oregon but within the United States, then
within four weeks from the date of the service of
this summons upon you; or if served outside the
United States, then within six weeks from the date
of the service of this summons upon you; and if you
fail so to answer, for want thereof, the plaintiff will
take judgment against you, and each of you, in the
sum of \$14,000.00, together with plaintiff's costs and

disbursements, as prayed for in Plaintiff's complaint, a true copy of which is herewith served upon you.

FARRENS & MAXWELL,

By R. B. MAXWELL,

Attorneys for Plaintiff. Post Office Address: 538
Main Street, Klamath Falls, Oregon.

State of Oregon,

County of Klamath—ss.

I, R. B. Maxwell, one of Plaintiffs Attorneys, do hereby certify that I have prepared the foregoing copy of Summons and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Klamath Falls, Oregon, dated this 21st day of April, 1954.

/s/ R. B. MAXWELL,

Attorney for Plaintiff.

EXHIBIT "B"

In the Circuit Court of the State of Oregon
for Klamath County

Law No.

CONSOLIDATED FREIGHTWAYS, INC., a Corporation,

Plaintiff,

vs.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES, a Corporation;
LUISOTTI BROTHERS, a Partnership, and
CHESTER A. BOYLE,
Defendants.

COMPLAINT

Plaintiff, for cause of action against defendants, alleges:

I.

At all times mentioned herein plaintiff was and is a corporation organized and existing under the laws of the State of Washington, but qualified to do and doing business in the State of Oregon, and engaged in the general transportation of property by motor vehicle in intrastate and interstate commerce.

II.

Defendants, Converse Trucking Co., also known as Converse Trucking Service, is a corporation engaged generally in the transportation of property by motor vehicle in interstate commerce; Sacramento Freight Lines is a corporation engaged in the transportation of property by motor vehicle; Luisotti Brothers are a partnership engaged generally in the trucking business.

III.

That on or about the 14th day of April, 1954, the said defendants, Converse Trucking Co., also known as Converse Trucking Service; Sacramento Freight Lines and Luisotti Brothers were operating a certain Peterbilt Tractor bearing California license No. BEX 15107 and owned by the said Luisotti Brothers, and a Trailmobile semi-trailer bearing an Interstate Commerce Commission Certificate No. MC 57974, which semi-trailer was owned by the Sacramento Freight Lines and which vehicles were being operated under the Interstate Commerce Commission authority of Converse Trucking Co., also known as Converse

Trucking Service, by and through Chester A. Boyle, an individual, the driver and the agent, employee and servant of said other-named defendants, in a southerly direction on U. S. Highway 97 at a point some five or six miles south of Klamath Falls, Oregon. At said time and place plaintiff was operating a certain 1949 Freightliner, 6-wheel, Cab-over-truck, and a 1948 Freightliner, 6-wheel trailer van, both loaded with produce, in a northerly direction along said highway. That at a point where said highway overpasses the main line of the Southern Pacific railroad a collision occurred between said vehicles.

IV.

Defendants, and each of them, were negligent in the operation of said vehicles in that:

1. They failed to keep any or a proper lookout;
2. They failed to keep their said vehicles under any or proper control;
3. They operated said vehicles at a speed greater than was reasonable or prudent under the circumstances then and there existing;
4. They failed to operate their said vehicles in their righthand half of the main traveled portion of the highway altho said portion of said highway was unobstructed and was available for their use;
5. They operated their said vehicles in more than one lane of a two-lane highway;
6. They allowed their said vehicles to cross the centerline of said highway and encroached upon the lefthand half thereof when the same was occupied by the vehicles of plaintiff;

7. They failed to yield the right-of-way to the vehicles of plaintiff.

V.

The negligence of defendants, as hereinabove set out, was the direct and proximate cause of the collision hereinabove mentioned.

VI.

As a direct and proximate result of the collision hereinabove mentioned, the above-mentioned truck of plaintiff was damaged and decreased in value in the amount of \$8,000.00; the above-mentioned trailer of plaintiff was damaged and decreased in value in the amount of \$2,500.00; the cargo carried upon said vehicles was damaged and decreased in value in the amount of \$1,500.00; plaintiff reasonably incurred necessary expenses in connection with said collision in the amount of \$1,000.00, and plaintiff will be deprived of the use of said vehicles for ten days to plaintiff's damage in the sum of \$1,000.00, all to plaintiff's damage in the total sum of \$14,000.00.

Wherefore, Plaintiff prays for judgment against defendants, and each of them, in the sum of \$14,000.00, together with plaintiff's costs and disbursements herein incurred.

Dated this 21st day of April, 1954.

FARRENS & MAXWELL,

By /s/ R. B. MAXWELL,

Attorneys for Plaintiff.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

BOND

Know All Men by These Presents that Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, as principals, and Hartford Accident and Indemnity Company, as surety, are held and firmly bound unto Consolidated Freightways, Inc., a corporation, in the penal sum of \$500.00 lawful money of the United States for the payment of which sum well and truly to be made unto the said Consolidated Freightways, Inc., we bind ourselves, our successors and assigns, jointly and severally by these presents.

This bond is upon the condition nevertheless that

Whereas said Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, the principal obligors herein, and defendants in the above-entitled court and cause, have filed their petition therein for the removal of said cause thereto from the Circuit Court of the State of Oregon for the County of Klamath,

Now, Therefore, if said Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle shall pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the case was not removable, or was improperly removed, then this obligation shall be null and void, otherwise to remain in full force and effect.

In Witness Whereof, said Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, as principals, have caused this instrument to be executed by one of their attorneys and Hartford Accident and Indemnity Company as surety, has caused this instrument to be executed and its seal attached this 13th day of May, 1954.

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By /s/ JOHN L. BOYD,
Resident Agent.

Countersign:

By /s/ JOHN L. BOYD,
Attorney-in-Fact.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES,
a Corporation, and CHESTER A. BOYLE,

By /s/ OGLESBY H. YOUNG,
One of Their Attorneys.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

NOTICE

To Consolidated Freightways, Inc., a Corporation,
Plaintiff, and to Farrens & Maxwell, Your Attorneys:

You and Each of You please take notice that de-

fendants Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle have filed in the above-entitled court, a petition and bond for removal of this cause from the Circuit Court of the State of Oregon for the County of Klamath, to the United States District Court for the District of Oregon.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Defendants, Converse Trucking Co.,
also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

INTERROGATORIES SUBMITTED TO PLAINTIFF
BY DEFENDANT CONVERSE
TRUCKING SERVICE

1. State the names and addresses of all persons known by plaintiff or its attorneys to have any knowledge of any material fact in connection with the accident of April 14, 1954, which forms the subject matter of plaintiff's complaint.

2. Have any claims of plaintiff or portions of such claims been paid by any insurance carrier by way of loan receipt or otherwise?

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant,
Converse Trucking Service.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS CONVERSE
TRUCKING SERVICE, IMPEADED AS
CONVERSE TRUCKING CO.; SACRA-
MENTO FREIGHT LINES AND CHESTER
A. BOYLE

First Defense

The complaint fails to state a claim against these answering defendants, or any of them, upon which relief can be granted.

Second Defense

These answering defendants deny each and every allegation contained in plaintiff's complaint and the whole thereof, generally and specifically, except they admit:

I.

At all times mentioned in plaintiff's complaint, plaintiff was a Washington corporation qualified to do business in the State of Oregon and is engaged in the general transportation of property by motor vehicle. Converse Trucking Service is a California corporation. Sacramento Freight Lines is a corporation, and both of said defendants are engaged in the general transportation of property by motor vehicle.

II.

On or about the 14th day of April, 1954, defendant Converse Trucking Service by its employee Chester A. Boyle, were operating a certain Peterbilt tractor owned by Luisotti Brothers and pulling a certain Trailmobile trailer owned by Sacramento Freight Lines. On said date said equipment was travelling southerly on Highway No. 97 in Klamath County, Oregon, approximately five miles south of Klamath Falls, at which time and place a certain truck and trailer owned and operated by plaintiff was proceeding northerly upon said highway.

III.

These answering defendants admit that a collision occurred between said vehicles and that the truck and trailer of plaintiff was damaged to some extent.

Third Defense

Plaintiff was guilty of contributory negligence constituting the sole or proximate cause of plaintiff's damage.

Fourth Defense

The accident and plaintiff's damages were unavoidable insofar as these answering defendants are concerned.

Wherefore having fully answered plaintiff's complaint, these answering defendants pray that plaintiff take nothing thereby.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

Attorneys for Defendants, Converse Trucking Service, Sacramento Freight Lines and Chester A. Boyle.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Comes now plaintiff and demands a trial by jury of all issues so triable.

Dated this 19th day of May, 1954.

FARRENS & MAXWELL,

By /s/ R. B. MAXWELL,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1954.

[Title of District Court and Cause.]

MOTION FOR TRIAL AND HEARING OF ALL
PRELIMINARY MATTERS AT KLAMATH
FALLS, OREGON

Comes now plaintiff and requests and moves the Court for an order directing that trial of the above-entitled matter and hearing upon all preliminary matters, including pre-trial proceedings, be held at Klamath Falls, Oregon, at such time or times as may be designated by the Court for the reason and upon the grounds that the accident and collision out of which this action arose occurred in Klamath County, Oregon, and that many witnesses will be called at the trial who are residents of Klamath County, Oregon.

Dated this 19th day of May, 1954.

FARRENS & MAXWELL,

By /s/ R. B. MAXWELL,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1954.

[Title of District Court and Cause.]

ORDER

Upon motion of plaintiff, it is

Ordered, that trial of the within action and all preliminary matters, including pre-trial proceedings,

be transferred to and heard at sessions of this Court at Klamath Falls, Oregon, at a date or dates to be later set by this Court.

Dated this 24th day of May, 1954.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 24, 1954.

[Title of District Court and Cause.]

MINUTES OF AUGUST 4, 1955

Now at this day come the plaintiff by Mr. Richard B. Maxwell, of counsel, and the defendants by Mr. John Gordon Gearin, of counsel. Now come the following-named jurors to try the issues joined, to wit: Gilbert Elder, William H. Zehr, Robert D. Adams, Jr., Donald Lester McGee, Walter A. McCaw, Jo Anna Taylor, R. P. Lien, Vincent R. Lawler, Frank Griffith, George E. Stevenson, Robert B. Norris and Glenn Haskins, twelve good and lawful men and women of this District, who, being accepted by the parties hereto, are duly impaneled and sworn.

The said jury having heard the statements of counsel and the evidence adduced, the trial of this cause is continued to tomorrow, Friday, August 5, 1955, at nine-forty-five o'clock a.m.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above-entitled Court at Klamath Falls, Oregon, on Wednesday, August 3, 1955. Plaintiff appeared by R. B. Maxwell of its attorneys and defendants appeared by John Gordon Gearin of their attorneys. The parties with the approval of the Court agree to the following:

Statement of Facts

I.

At all times mentioned in plaintiff's complaint, plaintiff was a Washington corporation; defendant Converse, a California citizen; Sacramento Freight Lines, a corporation, and all of said parties being duly authorized to do business in the State of Oregon in the transportation of commodities as motor carriers.

II.

On or about the 14th day of April, 1954, on Highway 97, Klamath County, Oregon, at a point approximately five miles south of Klamath Falls, a collision occurred between a truck and trailer owned and operated by plaintiff, which was proceeding north-erly upon said highway, and a certain Peterbilt Tractor owned by Luisotti Brothers (citizens and residents of California) and a certain Trailmobile trailer owned by Sacramento Freight Lines. Said tractor and trailer were operated by defendant Converse Trucking Service by its employee Chester A.

Boyle (a citizen and resident of the State of California).

III.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

IV.

As a proximate result of said collision the truck, trailer and freight of plaintiff was damaged and depreciated in the amount of \$10,160.45, and the equipment and the tractor of defendant Luisotti Brothers was damaged in the amount of \$6,717.70, and the trailer of defendant Sacramento Freight Lines was damaged in the amount of \$3,766.16.

Plaintiff's Contentions

I.

Plaintiff contends that defendants in the operation of said tractor and trailer were guilty of negligence proximately causing said accident in that:

1. They failed to keep any or a proper lookout;
2. They failed to keep their said vehicles under any or proper control;
3. They operated said vehicles at a speed greater than was reasonable or prudent under the circumstances then and there existing;
4. They failed to operate their said vehicles in their right-hand half of the main traveled portion of the highway altho said portion of said highway was unobstructed and was available for their use;

5. They operated their said vehicles in more than one lane of a two-lane highway;

6. They allowed their said vehicles to cross the centerline of said highway and encroached upon the left-hand half thereof when the same was occupied by the vehicles of plaintiff;

7. They failed to yield the right-of-way to the vehicles of plaintiff.

* * *

The foregoing contentions of plaintiff, and each of them, are denied by defendants.

Defendants' Contentions

I.

Defendants contend that plaintiff in the operation of its truck and trailer was guilty of negligence proximately causing said accident, consisting of the following:

1. It failed to keep any or a proper lookout;

2. It failed to keep its said vehicles under any or proper control;

3. It operated said vehicles at a speed greater than was reasonable or prudent under the circumstances then and there existing;

4. It failed to operate its said vehicles in its right-hand half of the main traveled portion of the highway altho said portion of said highway was unobstructed and was available for its use;

5. It operated its said vehicles in more than one lane of a two-lane highway ;

6. It allowed its said vehicles to cross the center-line of said highway and encroached upon the left-hand half thereof when the same was occupied by the vehicles of defendants ;

7. It failed to yield the right-of-way to the vehicles of defendants.

* * *

The foregoing contentions of defendants, and each of them, are denied by plaintiff.

Issues to Be Determined

1. Were defendants guilty of negligence in any particular as charged by plaintiff, and if so, was such negligence a proximate cause of plaintiff's damage ?

2. Was the plaintiff guilty of negligence in one or more of the particulars charged by defendants, and if so, was such negligence a proximate cause of defendants' damage ?

Physical Exhibits

Certain exhibits have been identified; it being understood that further identification of any exhibit will not be required, and that objections may be interposed to the introduction of evidence of any exhibit only on the grounds of immateriality and irrelevancy.

Plaintiff's Exhibits

1. Depositions of Joe E. Cornelson, Albert W. Cornelson and Chester A. Boyle.
2. Photographs.
3. Maps.
4. Reserved.
5. Officer's notebook.
6. Sealed exhibit for impeachment purposes only.

Defendants' Exhibits

1. Depositions of Joe E. Cornelson, Albert W. Cornelson and Chester A. Boyle.
2. Maps.
3. Photographs.
4. Reserved.
5. Sealed exhibit for impeachment purposes only.

Jury Trial

Timely demand was made for trial by jury.

Based upon the foregoing, the Court orders the cause set for trial, and it is further ordered that the foregoing pre-trial order shall not be amended except by consent of the parties or to prevent manifest injustice, and it is further ordered that the pre-trial order supersedes all pleadings.

Dated at Klamath Falls, Oregon, this 4th day of August, 1955.

/s/ JAMES ALGER FEE,
Judge.

Approved:

/s/ R. B. MAXWELL,
Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendants.

[Endorsed]: Filed August 4, 1955.

[Title of District Court and Cause.]

STIPULATION

It is stipulated and agreed between the parties, through their respective attorneys of record, that no objection will be raised and no error claimed by reason of the use of any deposition of Joe E. Cornelson, Albert W. Cornelson or Chester A. Boyle, regardless of whether such deposition was taken in connection with the within cause or in connection with some other action.

Dated this 5th day of August, 1955.

/s/ R. B. MAXWELL,
Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendants.

[Endorsed]: Filed August 5, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impanelled and sworn to try the above-entitled case and cause, do find our verdict in favor of plaintiff and against defendants Converse and Boyle and assess plaintiff's damages at \$10,160.45.

Dated at Klamath Falls, Oregon, this 5th day of August, 1955.

/s/ ROBERT S. ADAMS, JR.,
Foreman.

[Endorsed]: Filed August 5, 1955.

In the United States District Court
for the District of Oregon
Civil No. 7493

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,
Plaintiff,

vs.

R. N. B. CONVERSE dba CONVERSE TRUCK-
ING SERVICE, a Corporation; SACRA-
MENTO FREIGHT LINES, a Corporation;
LOUISOTTI BROTHERS, a Partnership;
and CHESTER A. BOYLE,
Defendants.

JUDGMENT

This cause came on regularly for trial before the undersigned Judge, sitting with a jury, in Klamath

Falls, Oregon, on Thursday, August 4, 1955. Plaintiff appeared by R. B. Maxwell, one of its attorneys, and defendants appeared by John Gordon Gearin, one of their attorneys. A jury was duly impanelled and sworn, and testimony was introduced on behalf of the plaintiff and said trial was continued until the following day, when testimony was introduced by and on behalf of the defendants. At the conclusion of all the testimony, a motion for dismissal of the action against Sacramento Freight Lines, a corporation, and Louisotti Brothers, a partnership, was allowed by the Court. Thereafter, the cause was argued to the jury which was instructed by the Court as to the law and, on said same day, retired to consider its verdict and, on said same day, returned into court its verdict reading as follows (caption omitted):

“We, the jury, duly impanelled and sworn to try the above-entitled cause, do find our verdict in favor of plaintiff and against defendants R.N.B. Converse and Chester A. Boyle, and assess plaintiff’s damages at \$10,160.45. Dated at Klamath Falls, Oregon, this 5th day of August, 1955. (Signed) Robert Adams, Foreman.”

Said verdict was duly accepted and filed, and judgment entered thereon. Now, therefore, based upon said verdict, it is

Ordered and Adjudged that plaintiff have judgment against defendants R. N. B. Converse and Chester A. Boyle, and each of them, in the sum of

\$10,160.45, and for its costs and disbursements herein taxed at \$.

Dated this 5th day of August, 1955.

/s/ JAMES ALGER FEE,
United States Circuit Judge Sitting by Assignment
to This District.

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

BILL OF COSTS

Bill of Costs claimed by Consolidated Freightways, Inc., a Corporation, plaintiff in the above-entitled cause, namely:

Fee of the Clerk of the Circuit Court	
filing of complaint	\$ 13.60
Fee of the Sheriff for service of	
Summons and Complaint.	12.43

Witness fees as follows:

Hugh Brown, attendance fee, 2	
days, Aug. 4th & 5th, @ \$4.00 ..	\$ 8.00
Mileage 600 miles @ 7c, Round-	
trip from Portland, Oregon. . . .	43.00 51.00

M. Lange, attendance fee, 1 day,	
August 5th	4.00
Mileage 550 miles @ 7c from Eu-	
gene, Oregon	38.50 42.50

20.92	24.92
-------	-------

Albert W. Cornellson, 2 days,		
Aug. 4th and 5th, @ \$4.00....	8.00	
Mileage, 100 miles, @ 7c.....	7.00	15.00
		<hr/>
Joe Cornellson, 1 day, Aug. 5th.....	4.00	
Mileage 100 miles @ 7c.....	7.00	11.00
		<hr/>
State Police Officer Winningham, 1		
day	4.00	4.00
State Police Officer Paxton, 1 day...	4.00	4.00
		<hr/>
Attorney's fee		20.00
		<hr/>
Total costs taxed at.....		<u>\$104.95</u>

Dated at Klamath Falls, Oregon, this 12th day of August, 1955.

/s/ R. B. MAXWELL,
Of Attorneys for Plaintiff.

State of Oregon,
County of Klamath—ss.

I, R. B. Maxwell, being first duly sworn, say:

That I am one of the attorneys for the plaintiff in the within-entitled action; that I have knowledge of the facts, that each item is correct and has been necessarily incurred in the within case and that services for which fees were charged have been actually and necessarily performed.

/s/ R. B. MAXWELL.

Subscribed and sworn to before me this 12th day of August, 1955.

[Seal] /s/ F. M. CARLSON,
Notary Public for Oregon.

For canceled material and figures appearing in italics.

R. De MOTT,
Clerk.

By /s/ F. L. BUCK,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

NOTICE

To: John Gordon Gearin, Attorney for Converse Trucking Service and Chester A. Boyle.

Please take notice that on Monday, August 22, 1955, plaintiff will apply to the Clerk of the United States District Court, District of Oregon, for taxation of costs in the within action.

Dated this 17th day of August, 1955.

MAXWELL & GODDARD,

By /s/ R. B. MAXWELL,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

OBJECTIONS TO COST BILL

Come now defendants R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle and object to the allowance to plaintiff of any attendance fee or mileage to Hugh Brown on the ground and for the reason that said Hugh Brown did not testify at trial. Defendants further object to the allowance of mileage to witnesses Albert W. Cornellson and Joe Cornellson in excess of the distance between the place of trial, i.e., Klamath Falls, and the Oregon-California boundary on the ground and for the reason that mileage is not allowable for travel outside the district in which the case is tried.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendants R. N. B. Converse, dba
Converse Trucking Service, and Chester A.
Boyle.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Plaintiff Above Named and to Your Attorneys
of Record:

You and Each of You please take notice that R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle hereby appeal from that certain judgment entered in the above-entitled cause on August 5, 1955, in favor of plaintiff and against these appealing defendants and do appeal from the whole and each and every part thereof.

Dated this 30th day of August, 1955.

R. N. B. CONVERSE, dba CONVERSE TRUCK-
ING SERVICE, and CHESTER A. BOYLE,

By /s/ JOHN GORDON GEARIN,
One of Their Attorneys.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice is hereby given that R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle, defendants above named hereby appeal to the Court of Appeals for the Ninth Circuit from the final

judgment entered against them in this action on August 5, 1955.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

Attorneys for Appellants R. N. B. Converse, dba
Converse Trucking Service, and Chester A.
Boyle.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 6, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents that we, R. N. B. Converse, dba Converse Trucking Service, a corporation, and Chester A. Boyle, as principals, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Consolidated Freightways, Inc., a corporation, in the full and just sum of Eleven Thousand Five Hundred Dollars (\$11,500.00) to be paid to the said Consolidated Freightways, Inc., its successors and assigns, to which payment well and truly to be made we bind ourselves, our personal representatives, heirs, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of September in the year of our Lord One Thousand Nine Hundred Fifty-Five.

Whereas, lately in the United States District Court for the District of Oregon in a cause pending in said Court between Consolidated Freightways, Inc., a corporation, and R. N. B. Converse, dba Converse Trucking Service, a corporation, and Chester A. Boyle, defendants, a judgment was rendered against said defendants, and the said defendants having filed in said court an Amended Notice of Appeal to reverse the judgment in the aforesaid cause, in which notice was given that appeal was taken to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such that if said R. N. B. Converse, dba Converse Trucking Service and Chester A. Boyle shall prosecute their appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is delayed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award if it fails to make its appeal good, then the above obligation to be void; else to remain in full force and effect.

R. N. B. CONVERSE, dba CONVERSE TRUCK-
ING SERVICE, a Corporation, and CHES-
TER A. BOYLE,

By /s/ JOHN GORDON GEARIN,
Of Their Attorneys,
Principal.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
A Corporation,

By /s/ ROBERT B. CUMMING,
Attorney in Fact.

Countersigned:

By /s/ ROBERT B. CUMMING,
Surety.

ORDER

The foregoing bond is hereby approved and is to stand as a supersedeas until the final determination of the appeal.

Dated this 30th day of September, 1955.

/s/ JAMES ALGER FEE,
Judge.

Consent is hereby given to entry of the foregoing order.

/s/ B. J. GODDARD,
Of Attorneys for Plaintiff.

[Endorsed]: Filed October 3, 1955.

United States District Court
District of Oregon

Civil No. 7493

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,

Plaintiff,

vs.

R. N. B. CONVERSE, Doing Business as CON-
VERSE TRUCKING SERVICE, SACRA-
MENTO FREIGHT LINES, a Corporation,
and LUISOTTI BROTHERS, a Partnership,
and CHESTER A. BOYLE,

Defendants.

August 4, 1955

Before: Honorable James Alger Fee, Judge of the
United States Court of Appeals, Ninth
Circuit, sitting by assignment as Judge of
the above-entitled court.

Appearances:

MAXWELL & GODDARD,

Attorneys for Plaintiff.

KOERNER, YOUNG, McCOLLOCH & DE-
ZENDORF, By

JOHN GORDON GEARIN,

Attorneys for Defendants.

TRANSCRIPT OF PROCEEDINGS

Mr. Gearin: There is one thing. I just learned something that I have mentioned briefly to Mr. Maxwell. There is a question about the corporate capacity of Converse Trucking Company. I don't believe the corporation papers have been finished. We will ask at a later time to substitute R. N. B. Converse, d.b.a. Converse Trucking Company as and for the Converse Trucking Company, a corporation.

Mr. Maxwell: I have no objection to that, your Honor, depending upon the facts. We have been both following the assumption that the defendant was a corporation.

Mr. Gearin: We will discuss that at the first recess. If there is an amendment necessary we will stipulate that it revert back to the filing of the complaint or to the filing of the pre-trial order.

Mr. Maxwell: That is satisfactory with me, your Honor.

The Court: I will sign the pre-trial order, then, with that understanding.

(Thereupon a jury was duly and regularly impaneled and sworn, counsel for the respective parties made opening statement to the jury, and thereupon the following proceedings were had): [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

JOE E. CORNELSON

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Your name is Joe E. Cornelson?

A. Yes.

Q. Where do you live, Mr. Cornelson?

A. Huntington Park, California.

Q. What is your occupation?

A. Truck driver.

Q. On the 14th day of April, 1954, by whom were you employed?

A. Consolidated Freightways.

Q. Were you the driver of the Consolidated truck that was involved in the collision that is the subject of this case?

A. Yes.

Q. What kind of equipment were you operating, Mr. Cornelson?

A. It is what is known as truck and trailer.

Q. Can you describe briefly what that is?

A. Well, it is a truck that pulls a full trailer.

Q. It is a full truck and a full trailer?

A. Yes, that is correct.

Q. When did you start on the trip?

A. As I remember, it was approximately midnight of the 12th of April from Los Angeles. [3]

Q. Where were you en route to at the time?

A. Portland, Oregon.

(Testimony of Joe E. Cornelson.)

Q. Calling your attention to the 14th day of April, 1954, Mr. Cornelson, will you just describe what happened say from about daylight on that morning?

A. Well, at approximately daylight I was coming off the Hebron Mountain. I can remember seeing the sun shining and seeing patches of fog down below, and I can remember passing through patches of fog until I arrived at Dorris, at which I had to stop at the inspection station due to the fact I had on agricultural products. Then from there up and proceeding to the top of a little hill outside of Dorris there was some ice forming and being a bother, naturally, on my truck, so I stopped at the top of the hill and removed the ice. That is the last clear memory that I have on that day.

Q. You don't remember any of the details of driving from a little hill outside of Dorris to the scene of the accident?

A. No.

Q. Do you recall anything about the accident itself?

A. No.

Q. When is your next memory, Mr. Cornelson?

A. Well, I was told it was on the afternoon of the third day, but I wouldn't know about that.

Q. Where did you recover your memory? [4]

A. In the Klamath Falls Hospital.

Q. Was anyone with you on this trip?

A. My brother Albert.

Q. Where was he the last time you remember?

A. He was sitting in the off seat.

Q. That is in the cab on your side?

(Testimony of Joe E. Cornelson.)

A. Yes, on the opposite side from the driver.

Q. When did he take that position?

A. At the Dorris inspection station.

Mr. Maxwell: You may cross-examine.

Cross-Examination

By Mr. Gearin:

Q. Mr. Cornelson, had you been talking with your brother after you left Dorris?

A. Yes, I can remember talking to him at Dorris.

Q. I mean after you got in the tractor.

A. Yes.

Q. You were talking as you were proceeding north?

A. Yes.

Q. You have an action pending against Converse and others for personal injuries in the California court, don't you?

A. I do.

Mr. Gearin: I have no further questions.

(Witness excused.) [5]

ALBERT CORNELSON

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Where do you live, Mr. Cornelson?

A. Long Beach, California.

(Testimony of Albert Cornelson.)

Q. What is your occupation?

A. Truck driver.

Q. On April 14th, 1954, by whom were you employed?

A. Consolidated Freightways.

Q. On the 14th day of April where were you?

A. Riding in that vehicle that was involved in the accident.

Q. Had you been with your brother on the whole trip, Mr. Cornelson?

A. Yes.

Q. When did you get into the driving compartment of the vehicle?

A. That was at Dorris, at the inspection station.

Q. Where were you located in the vehicle from then on until the accident occurred?

A. In that off seat of the driver in the cab.

Q. Can you describe the weather and the conditions of the highway between Dorris and the scene of the accident?

A. The weather was patchy fog, and where it wasn't fog [6] it was as clear as it is today; the sun was shining. You had a patch of fog and you ran out of that and it would be bright daylight. The road, as I remember it, was dry, the surface.

Q. Do you recall what the condition of the lights on your vehicle were?

A. They were all burning, headlights and clearance lights.

Q. Was that true all the time, say, from Dorris up to the time of the accident?

(Testimony of Albert Cornelson.)

A. Yes. They were on to run in the fog and we kept them on continuously.

Q. Were those lights burning at the time of the collision? A. Yes.

Q. Can you state to the jury the approximate speed of your vehicle as you came up to this overpass?

A. I would say when we approached the overpass we hit a patch of fog, and Joe immediately began to slow down. By the time we reached the top of the overpass we were approximately going 30 miles an hour.

Q. What would you say your speed was as you came up to the overpass?

A. About 40 miles an hour; not over that.

Q. Now Mr. Cornelson, just describe what you remember of the events leading up to the accident and the collision itself. [7]

A. I was sitting there not paying too much attention to the driving, relaxed, and as we approached the overpass we hit a patch of fog, and as we neared the summit I remember seeing a set of headlights, and my impression was——

Mr. Gearin: We would object to his impression, your Honor.

Q. (By Mr. Maxwell): Just state what you saw.

A. I saw a set of headlights, and I made a statement to my brother, "What is he doing on the

(Testimony of Albert Cornelson.)

wrong side of the road? The so-and-so is going to hit us." And at that time he did.

Q. Were you able to see at that time the center line in the highway? A. Yes.

Q. How many lanes are there there?

A. At that time there were three.

Q. Can you state the position of the headlights which you saw in relation to the center line?

A. The headlights that I saw were astraddle of the dividing line.

Q. Was the collision with the vehicle bearing those headlights? A. Yes.

Q. From the time you saw those headlights, Mr. Cornelson, was there any change in the course of your vehicle? A. Yes.

Q. What was that? [8]

A. At the time that I spotted the headlights I remember my brother swerving the vehicle to the right of the road as far as possible.

Q. Can you give us any estimate of the time that elapsed from the time you saw the headlights to the time the collision occurred?

A. It couldn't have been over two or three seconds.

Q. What happened to you in the collision, Mr. Cornelson?

A. I was thrown out, thrown out of the front of the vehicle.

Q. Were you able to be around the scene of the collision afterwards? A. Yes.

Q. What did you do?

(Testimony of Albert Cornelson.)

A. Immediately upon falling out of the vehicle I noticed my brother lying on the pavement. He had fell out with me. About that time I heard the noise of an approaching truck. My first thought was to stop the approaching vehicle to keep him from running into the wreck that had just happened. So I flagged him down and flagged the following truck, which was a West Coast, and proceeded to get some fusees from him, and moved on down the hill and flagged a Converse rig down, and I asked the Converse driver if he would go down the hill and place some more fusees; that I wanted to get back up on the hill and check up on my brother and also check the south side of the overpass to see how the other driver [9] did, and if there had been fusees placed there.

Q. When you described you heard a vehicle coming, that would be from the north?

A. Right.

Q. From Klamath Falls? A. Right.

Q. And the vehicles that you flagged down and the fusees that you put out were to the north?

A. Yes.

Q. All right. Then what did you do after that?

A. After I had gone back up the hill—I seen my brother was hurt. About the next thing I remember is this Converse driver, a fellow by the name of Reynolds, and he asked me if I had seen any——

Mr. Gearin: We object to any conversation with Mr. Reynolds, your Honor, as being hearsay.

(Testimony of Albert Cornelson.)

Mr. Maxwell: Don't say anything about any conversation.

A. I see.

Q. Were you there, Mr. Cornelson, when the state officers arrived? A. Yes.

Q. Did you afterwards leave the scene of the accident? A. Yes.

Q. Whom did you leave with?

A. Mr. Boyle. [10]

Q. Mr. Boyle was the driver of the Converse equipment? A. Yes.

Q. Did you have any conversation with Mr. Boyle about how the accident happened?

A. Not when we left the scene of the accident, no.

Q. Did you at any time have any conversation with Mr. Boyle about how the accident happened?

A. Yes.

Q. And what did he say about the accident?

A. I remember asking him what he was doing on our side of the road, and he admitted driving with his head out the window and he was on the white line, the dividing line of the highway.

Q. When did that conversation occur?

A. Beg pardon?

Q. When did that conversation occur?

A. Approximately five or ten minutes after the accident itself happened.

Q. Before you had left the scene of the accident?

A. That is right.

(Testimony of Albert Cornelson.)

Q. Did you go back to the scene of the accident later that day?

A. Approximately ten o'clock that morning.

Q. Did you examine the situation there?

A. Yes, I looked it over. [11]

Q. Did you observe any marks on the highway or the overpass?

A. Yes, there was a gouge mark which would be to the east of the center line of the highway, and that gouge mark continued from where it started to where it stopped, and where it came to a stop was where the Converse rig came to rest.

Q. Can you say at what part of the Converse rig that gouge mark stopped?

A. Yes, at the rear axle housing of the Converse tractor.

Q. At the rear axle. What was the condition of the rear axle?

A. Both left wheels were knocked completely off of it and the axle housing was dragging on the ground.

Q. That would be the dual wheels?

A. Yes.

Q. Can you state to the best of your recollection what would be the distance from the broken end of the axle housing to the outside of the two dual wheels?

A. Approximately two and a half feet.

Q. Did you observe any other marks at the scene?

(Testimony of Albert Cornelson.)

A. I noticed scuff marks from the tires rubbing on the side of the curbing that were made by our vehicle.

Mr. Gearin: We object to that last remark, your Honor, and ask that it be stricken and the jury instructed to disregard it.

The Court: Overruled.

Q. (By Mr. Maxwell): Had your vehicle been moved at the [12] time you got there, Mr. Cornelson? I mean at ten that morning.

A. That I don't remember.

Q. Do you know whether the other vehicle had been moved? A. I don't believe so.

Q. What other marks were there, if any, on the bridge itself, the overpass, Mr. Cornelson?

A. As I mentioned, these scuff marks of the tires, and there was also an imprint left by one of the tires on the Freightways rig upon the top railing of the bridge.

Q. What do you mean by "imprint"?

A. It was an imprint left—it was the letters that Freightways uses to identify their tires with. There was four letters, F-L-E-E and part of a T, for distinction.

Q. What was the condition of the railing on the bridge? A. It was broken in places.

Q. Did you examine the tires on your equipment? A. Yes.

Q. What was their condition?

A. They had fresh scuff marks on them.

Mr. Maxwell: You may cross-examine.

(Testimony of Albert Cornelson.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Cornelson, you were seated in the right side of the cab? [13] A. That is correct.

Q. That was a Freightliner cab-over?

A. Check.

Q. How wide is that cab?

A. Approximately seven feet.

Q. And the width of your rig was eight feet?

A. Over-all outside dimensions.

Q. You were seated on the extreme right?

A. Check.

Q. And you say when you got onto the bridge there was fog. How thick was the fog? Can you give us any idea?

A. Well, the visibility was limited but you could see approximately 75 to 100 or possibly a little bit more.

Q. Would you say 150 feet?

A. Yes, I believe up to that far.

Q. All right, sir. You talked with Mr. Boyle? That is our driver. A. That is right.

Q. You said he told you he was on the white line?

A. On the dividing line of the highway.

Mr. Gearin: Would you hand the witness, please, Pre-Trial Exhibit No. 1, the deposition of Albert A. Cornelson?

The Clerk: It doesn't seem to be in the file.

(Testimony of Albert Cornelson.)

The Court: Is it stipulated that a copy may be used instead of the original? [14]

Mr. Gearin: Yes, we stipulate.

Mr. Maxwell: So stipulated.

Mr. Gearin: And the other depositions which Mr. Maxwell and I have which may not have been filed.

The Court: All right.

Mr. Maxwell: So stipulated.

Q. (By Mr. Gearin): Will you turn to page 18, please. Now do you recall when your deposition was taken? A. Not the exact date.

Q. Do you recall your deposition being taken on March 28, 1955, in Los Angeles, California?

A. Yes.

Q. I will ask you if at that time you were asked these questions and you gave these answers:

“Q. Later on did you talk to the driver of the other truck? A. Just for a few words.

“Q. Did he identify himself to you?

“A. Yes.

“Q. His name was Mr. Boyle?

“A. Chester A. Boyle.

“Q. Did he tell you anything about how the accident happened?

“A. The only statement he made to me, as I recall, was that ‘I was driving with my head out of the window watching the white line.’ [15]

“Q. Anything else?

“A. That is, to me. That is all I remember he made to me.”

(Testimony of Albert Cornelson.)

Did you so testify? A. Yes.

Q. Now you stated that your speed was approximately 30 miles an hour up on the underpass?

A. At the time of the impact, yes.

Q. I will ask you if at the scene of the accident you had a conversation with Officer Byron D. Winningham, an officer of the State Police.

A. Yes.

Q. I will ask you if at that time you stated to Officer Winningham that you were doing 45 miles an hour? A. Yes.

Mr. Gearin: I have no further questions.

Mr. Maxwell: I have no further questions.

(Witness excused.) [16]

BYRON D. WINNINGHAM

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. You are Officer Byron D. Winningham?

A. Yes.

Mr. Gearin: I will stipulate that any photographs you have may be received in evidence without further identification, and they can be handed directly to the officer.

Mr. Maxwell: I think that was provided in the

(Testimony of Byron D. Winningham.)

pre-trial order, but I should like to have them entered and received at this time, your Honor.

Mr. Gearin: No objection.

The Court: Received.

(A group of photographs was received in evidence as Plaintiff's Exhibit 2.)

Q. (By Mr. Maxwell): Officer Winningham, you have been handed a group of, I believe, eleven photographs. Are you able to recognize the scenes portrayed by those photographs?

A. Yes, sir; I am.

Q. And what do they portray?

A. An accident that I investigated in April, 1954.

Q. That is the accident between the Converse rig and the Consolidated rig on the railroad overpass south of town? [17]

A. Yes, sir.

Q. Are those fair representations of the appearance of the overpass and of the vehicles and their locations following that accident?

A. Yes, sir. They look exactly like it.

Q. Officer, do you recall about what time you got to the scene of the accident?

A. With your permission I would like to refer to my notebook to refresh my recollection.

Q. Certainly. You may do that to refresh your recollection.

Mr. Gearin: We have no objection, Officer.

Mr. Maxwell: Before you do that, I think we sort of skipped a preliminary or two here, Officer.

(Testimony of Byron D. Winningham.)

I guess your name is in the record, but will you state where you live and what your occupation is?

A. My name is Byron D. Winningham, and I am employed by the Oregon State Police here in Klamath Falls.

Q. You were an officer in the Oregon State Police on April 14th, 1954? A. Yes, sir; I was.

Q. Would you go back and tell me what time you arrived at the scene of the accident?

A. According to my notebook on April 14th I arrived at the scene of the accident at 6:35 a.m.

Q. Now officer, you investigated generally the accident? A. Yes, sir. [18]

Q. Did you find any marks on the highway?

A. Yes, sir; I did.

Q. Would you just describe what marks you found and where they were located?

A. In referring to the diagram that I drew at the scene of the accident, I have several large gouge marks connected by a scuff mark that wasn't actually heavy enough to make a deep gouge in the pavement, but it was apparent that a piece of steel——

Mr. Gearin: We are going to object, your Honor, to what was apparent. I think the officer can testify to what he saw and what he found, but the significance, I believe, would be for the jury to determine.

The Court: That is not the rule exactly. He can testify to the conditions that he found and as he saw them at the time, and then after he has stated

(Testimony of Byron D. Winningham.)

the facts of his observation then he may also give his conclusions as to what caused them.

Q. (By Mr. Maxwell): Just state what you saw now, Officer.

A. Would you like at this time to have the measurements and the position of these gouges?

Q. If you can give us the measurements of the gouges, first talking about this scuff mark and then whatever else you saw. [19]

A. The material making the original scuff mark, the first gouge, measured 13 feet 9 inches from the west curb line.

Q. 13 feet nine inches?

A. Yes, sir, from the west curb line of the overpass, it being 12 feet 4 inches from the east curb. That is the first gouge that I observed, the initial gouge in the pavement.

Q. Before going on, Officer, how wide is the pavement between curbs at that point?

A. The distance between the two curb lines is 26 feet.

Q. Thank you.

A. In addition to the gouge marks I observe tire scuff marks along the west side of the curb line measuring 14 feet 9 inches from the initial gouge mark and measuring from the south 169 feet—correction—77 feet 10½ inches from the south end of the overpass along the curb line.

Q. Were you able to trace the gouge marks from

(Testimony of Byron D. Winningham.)

the first one that you have described to any place?
Were you able to trace that gouge?

A. Yes, sir. Standing at the first gouge measured, looking in a southwesterly direction, there were deep gouge marks and, as I said a while ago, a scuffing where some steel had been dragged along on top of the pavement and it followed each gouge line directly up to the rear axle housing of the Converse truck. That is, the south-bound truck.

Q. Did you examine the rear axle housing? [20]

A. Yes, sir; I did.

Q. What was its condition?

A. Well, sir, the two drivers, left rear drivers, were knocked off.

Q. The two left rear drivers. I assume by that you mean the dual tires? A. Yes, sir.

Q. Were they there at the scene of the accident?

A. Yes, sir; they were.

Q. Are they shown in any of the photographs that were handed to you?

A. Yes, sir. This one.

Q. Would you turn over the picture that you are referring to and read the number off the back, Officer. A. Exhibit 2-A.

Q. That does show the drivers to which you refer? A. Yes, sir.

Q. Can you tell us, Officer, how far it was to the rear of the Converse equipment from the first gouge mark? A. 65 feet 2 inches.

Q. All right. Now, Officer, going back, you started to describe the tire marks on the curb, I be-

(Testimony of Byron D. Winningham.)

lieve it was, or did you? A. Yes, sir; I did.

Q. Would you just describe what marks you saw and where they were. [21]

A. Going back to the measurements I gave you before, 77 feet 10½ inches from the south end of the bridge scuff marks went in a northeasterly direction, and they followed along the curb line for several feet—the exact distance I didn't measure—at which time they came up over the curb, and there were two or three little scuff marks in the same direction up to the railing. At the point where they reached the top of the railing they imprinted a four-letter word here, "F-l-e-e-t," which was found to be from the left front wheel of the north-bound Consolidated trailer—correction—the right front wheel.

Q. Officer, can you give us to the best of your ability the distance between the end of the broken axle on the Converse equipment and the outside of the dual wheels before they were broken off?

A. I would say 12 to 14 feet.

Q. I don't think you understood my question, Officer. The distance from the end of the broken axle to the outside of the wheels before they were broken off.

A. Yes, sir. It would be 30 inches, something in that category.

Mr. Maxwell: I believe, if the Court please, it would be helpful in understanding the case if the pictures could be handed to the jury at this time for their examination.

(Testimony of Byron D. Winningham.)

Mr. Gearin: Fine. [22]

The Court: All right.

Mr. Maxwell: I have no further questions of the witness.

Mr. Gearin: May I delay cross-examination, your Honor, until the jurors have had time to see the photographs?

The Court: Yes. While the jury's attention is occupied with something else, the Clerk calls my attention to the fact that these depositions were not taken in this action but were taken in another action, and so therefore I will ask a written stipulation to the effect that they may be used.

Mr. Gearin: Your Honor, the deposition of Joe Cornelson was taken in connection with another action. There was no interrogation of Mr. Cornelson with regard to his testimony on his deposition. The deposition to which I referred, your Honor, was that of Albert Cornelson, which bears the caption of this cause. I can submit a copy to the Court if you would like to see it, your Honor. I have a duplicate original marked as a pre-trial exhibit.

The Court: What led me astray is that they are duplicates.

Mr. Gearin: We will enter into any type of stipulation the Court would desire.

The Court: All right. Put in something so there won't be any question about what we are doing. This seems to be all right, this duplicate original being marked, having been entitled in this action. I think that probably cures [23] it. I would like to

(Testimony of Byron D. Winningham.)

have the record corrected before the close of the case.

Mr. Maxwell: May I ask a couple more questions that I neglected to ask, your Honor?

The Court: Yes.

Q. (By Mr. Maxwell): Officer Winningham, did you have any assistance in your investigation there? A. Yes, sir; I did.

Q. Who was with you?

A. Officer Paxton. He arrived at the scene shortly after I did.

Q. Now, did you observe a center line on the highway there, Officer Winningham?

A. Yes, sir; I did.

Q. Can you tell us from your records the distance that the first gouge mark you have described was from the center line and in which direction?

A. Well, sir, I would have to figure this. I have the measurement taken and a cross-section of the highway.

Q. Let me ask you this: Was the center line in the physical center of the highway?

A. Within a minute distance either way.

Mr. Maxwell: Thank you. You may cross-examine. [24]

Cross-Examination

By Mr. Gearin:

Q. Officer, you have been asked to testify in our behalf in this proceeding, haven't you?

A. Yes, sir; I have.

(Testimony of Byron D. Winningham.)

Q. There was a lot of debris all over the highway when you got there? A. Yes, sir.

Q. Would it be a fair statement to say there were lots of gouge marks and marks on the highway that showed there that you did not identify or didn't measure as to their position?

A. There were other gouge marks that I didn't measure or locate.

Q. They were scattered pretty well all over, weren't they?

A. Well, sir, in a general direction. However, they were in different forms. That is, they didn't pattern each other as far as being one made by the same thing. There was a variation in the design that they left.

Mr. Gearin: Thank you, Officer. We have no questions.

(Witness excused.) [25]

JOHN W. PAXTON

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Where do you reside, Mr. Paxton?

A. 1006 Laurel Street, Klamath Falls, Oregon.

Q. What is your occupation?

(Testimony of John W. Paxton.)

A. Oregon State policeman.

Q. Did you have occasion to go to the scene of the accident on the railroad overpass on Highway 97 on April 14th, 1954? A. Yes, sir.

Q. What did you do there?

A. I assisted Officer Winningham in the investigation, and also taking measurements of the scene and directing traffic.

Q. Did you assist him in making the measurements? A. Yes.

Q. Did you hear Officer Winningham's testimony here, Mr. Paxton? A. Yes.

Q. If asked the same questions would you give substantially the same answers? A. Yes.

Mr. Maxwell: I have no further questions.

Mr. Gearin: I have no questions, Officer.

(Witness excused.) [26]

MERTON LANG

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Where do you live, Mr. Lang?

A. Eugene, Oregon.

Q. What is your occupation?

(Testimony of Merton Lang.)

A. Terminal Manager for Consolidated Freightways.

Q. On April 14th, 1954, where did you live and what was your occupation?

A. I lived at Klamath Falls, Oregon, at that time and I was Terminal Manager for Consolidated Freightways here in Klamath Falls.

Q. Did you go to the scene of the accident that occurred on the highway overpass on April 14th, 1954?

A. Yes.

Q. About what time did you arrive there, Mr. Lang?

A. Well, approximately a quarter after seven.

Q. And what did you observe there?

A. Well, I investigated the accident, and the prime objective was to make sure that we had officers there. They were both there, or one of them I know for sure was there when I got there. And I did ask the officer if he was taking the measurements, and so forth, which I would have done if he hadn't been [27] there, and he said he had. Then I just proceeded to investigate and look over the accident.

Mr. Maxwell: May I ask that the witness be handed the photographs, Exhibit 2.

Q. Will you look over the photographs, Exhibit 2, Mr. Lang, and I will ask you if those are fair representations of the scene of the accident and the vehicles as they appeared after the accident?

A. Yes, exactly.

Q. Did you observe any gouge marks upon the

(Testimony of Merton Lang.)

highway? A. Yes, I did.

Q. Would you describe what you saw?

A. Well, I can describe it off of one of the photos here, if that is permissible. There is one distinct gouge mark.

Q. Mr. Lang, before using a photograph would you turn it over and read the number on the back of it.

A. Yes. 2-G. These gouge marks I observed and they could be traced distinctly to the Converse rig.

Q. Describe where they started, Mr. Lang.

A. Well, I would have to go back to Exhibit 2-K. They started just a short distance behind our trailer and the gouge mark continued over and across the center line of the highway there.

Q. When you say "across it" to which side do you mean?

A. To the Consolidated side or the east side. [28]

Q. Now, Mr. Lang, at the scene of the accident did you talk to the driver of the Converse rig?

A. Yes, I did.

Q. Did he make any statement to you concerning the accident or his conduct preceding the accident?

A. Yes, he did.

Q. What was his statement?

A. He told me that he was lucky to be alive; that he had been driving with his hand or his arm and his head out of the window and wiping off the windshield.

Mr. Maxwell: Thank you. You may cross-examine.

(Testimony of Merton Lang.)

Cross-Examination

By Mr. Gearin:

Mr. Gearin: Your Honor, may I open the sealed exhibit, which is Pre-Trial Exhibit 4?

Mr. Maxwell: No objection.

Q. (By Mr. Gearin): Mr. Lang, you made a report of this accident to Consolidated Freightways, Inc., Accident Investigation Board, didn't you?

A. Yes, I filled out the accident report.

Mr. Gearin: I am going to ask that this document be marked Exhibit 4-A by the reporter, being a portion of the sealed exhibit to be used for impeachment purposes only, and handed to the witness.

(The document referred to was marked by the reporter as Defendant's Exhibit 4-A.) [29]

Q. Mr. Lang, there is being handed you a document, which is the Investigation Board's decision, the report of Consolidated Freightways to Interstate Commerce Commission, and your report to your company regarding your conversation with Mr. Boyle. Will you look at those documents and see if I am correct? A. Yes, that is correct.

Q. Isn't it a matter of fact that you told your employer that Mr. Boyle told you that he was lucky to be alive, and that he was driving with his head out of the window? Look at the last page. Look at your report, please.

A. Yes, that is correct.

(Testimony of Merton Lang.)

Q. You didn't tell your employer that Mr. Boyle told you he was cleaning off his windshield, did you?

A. Apparently I did not in the report.

Mr. Gearin: That is all.

Mr. Maxwell: I have no further questions.

(Witness excused.)

Mr. Maxwell: Plaintiff rests, your Honor.

(Thereupon, after cautionary instructions to the jury by the Court, an adjournment was taken until 9:45 a.m., Friday, August 5, [30] 1955.)

August 5, 1955

The Court: You may proceed.

BYRON D. WINNINGHAM

was produced as a witness in behalf of the defendants and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Winningham, what were the weather conditions as you were approaching the scene of the accident?

A. There was spots of ground fog, very dense.

Q. Will you state whether or not you received an emergency call to go to the scene of the accident?

A. Yes, sir; I did.

(Testimony of Byron D. Winningham.)

Q. As you approached the overpass will you state how fast you were driving your police car.

A. After I reached Highway 97 I slowed down to, oh, ten or fifteen miles an hour.

Q. Where did the heavy fog begin?

A. I came in on Sutton Road, which is northeast of the overpass, and I reached the dense fog just about the railroad tracks.

Q. About how far would that be from the place of the accident? [31]

A. About three-quarters of a mile.

Mr. Gearin: I have no further questions.

Mr. Maxwell: I have no cross-examination.

(Witness excused.)

ROBERT ADAMS

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Adams?

A. Warrenton.

Q. Warrenton, Oregon? A. Yes.

Q. What is your occupation?

A. Truck driver.

Q. By whom are you employed at the present time? A. Walter Freeman.

(Testimony of Robert Adams.)

Q. By whom were you employed in April of 1954? A. L.A.-Seattle.

Q. That is the Los Angeles-Seattle Motor Express? A. Yes. [32]

Q. Did you come upon the scene of this accident we have been discussing here on the overpass on April 14th between a Consolidated rig and a Converse rig? A. Yes.

Q. Had you seen the Consolidated rig prior to the time that you saw it in the accident?

A. Yes.

Q. Where was the first time that you saw it that day or that morning?

A. Well, the first time was at the "bug station."

Q. You mean Dorris? A. Yes.

Q. When was the last time you saw it before the accident?

A. Well, I caught up with him going up Dorris hill.

Q. Then when was the last time you saw him before the accident?

A. Well, just as we were dropping off Dorris hill we hit a solid bank of fog and I backed off, and that is the last I saw of him.

Q. How fast were you going at that time?

A. About 50 miles an hour.

Q. You say you backed off. What does that mean? A. Slowed down.

Q. About how far was that from the scene of the accident?

A. Oh, five or six miles, I suppose. [33]

(Testimony of Robert Adams.)

Q. At any time did you see the Consolidated rig stop on the highway or off the highway?

A. No.

Q. At any time did you see the Consolidated driver or helper do anything with his air filter or any mechanical portion of his rig? A. No.

Q. How fast was the Consolidated rig going the last time you saw it?

Mr. Maxwell: If the Court please, the plaintiff objects to that on the ground of immateriality by reason of remoteness.

Mr. Gearin: We can tie it up, your Honor.

The Court: The speed six miles from the accident?

Mr. Gearin: And the time that he arrived at the accident and what had occurred at that time would be relevant, your Honor.

The Court: I think it is too remote. Objection sustained.

Q. (By Mr. Gearin): Mr. Adams, what was the first thing that called your attention to the fact there was something wrong up on the highway ahead of you?

A. Well, the Converse driver come staggering down the road.

Q. When you say "staggering" what do you mean by that?

A. Well, he was apparently in a state of shock. He was [34] trying to stop me. He was right square—I just come right up on him; that is all.

Q. You don't mean he was intoxicated?

(Testimony of Robert Adams.)

A. Oh, no, no, no. However, that was my first impression.

Q. Had he been injured? A. Yes.

Q. All right. Now from the time that you slacked off and last saw the Consolidated rig up to the time of the accident will you tell us what the fog conditions were, if any?

A. Well, it was solid, it was a solid bank of fog the full length of it.

Q. How far could you see ahead of you?

A. Well, I wouldn't be able to say in feet, but not very far.

Mr. Gearin: You may inquire.

Mr. Maxwell: I have no questions.

(Witness excused.) [35]

EUCLID THOMPSON

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. You are Euclid Thompson? A. Yes.

Q. Where do you live, Mr. Thompson?

A. Woodburn, Oregon.

Q. What is your occupation?

A. Truck driver.

Q. By whom are you employed at the present time? A. Warren Williams.

(Testimony of Euclid Thompson.)

Q. That is Williams Freight Line?

A. Yes, sir.

Q. By whom were you employed in April of 1954? A. Exley Produce Express.

Q. Did you come upon the accident we have been talking about here? A. Yes.

Q. Had you seen the Converse rig prior to that time? A. Yes.

Q. When did you first see the Converse rig that day? A. North of Klamath Falls.

Q. When was the last time that you saw the Converse rig [36] before the accident?

A. I believe it would be about three-quarters of a mile, maybe a half a mile, before the accident.

Q. What were the weather conditions at a point approximately three-quarters of a mile north of the scene of the accident? A. It was heavy.

Q. Heavy what? A. Heavy fog.

Q. Was that fog patchy or continuous? How would you describe it from that point to the point of the accident? A. It was continuous.

Q. Can you give us any idea what the visibility was, how far you could see ahead?

A. Approximately 50 feet.

Q. Do you know who arrived at the scene of the accident first, after the accident that would be, going in a southerly direction?

A. There was a West Coast was behind me.

Q. It was behind you? A. Yes.

Q. Were you the first driver there south bound?

A. Yes.

(Testimony of Euclid Thompson.)

Q. Will you describe what happened and what you saw as you came upon the scene of the accident?

A. Well, as I was approaching I dropped another gear, and [37] the Converse was laying on its side there, and I was on top of it before I realized that the road was blocked, and there was no one out to give me a sign to slow down.

Q. Did you see anybody on the highway north of these rigs waving traffic down?

A. Not out far enough where I could stop, no.

Q. How close did you come to the wrecked vehicles before you were able to stop?

A. I hit the trailer, one of the trailers, that was across the road.

Q. At that time what were the weather conditions with regard to fog? A. Heavy fog.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Maxwell:

Q. How was the temperature, Mr. Thompson?

A. Pardon?

Q. How was the temperature?

A. I wouldn't know how to say the temperature would be.

Q. Was it freezing? A. No, sir.

Q. Was it cold? A. Chilly, I would say.

Mr. Maxwell: That is all.

(Witness excused.) [38]

CHESTER A. BOYLE

was produced as a witness in behalf of defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Boyle, you are one of the defendants in this case? A. Yes, sir.

Q. What is your occupation?

A. Truck driver.

Q. How long have you been driving truck?

A. Approximately 15 or 20 years, most of the time.

Q. Are you a little hard of hearing?

A. Just a little bit; not much.

Q. If you don't hear any of my questions or don't hear them clearly, or those of Mr. Maxwell, will you make it known to us? A. Yes.

Q. By whom are you employed at the present time? A. Converse Trucking Company.

Q. You were the driver involved in this accident we have been talking about? A. Yes.

Q. Where did you pick up your load?

A. At Portland.

Q. Where were you going? [39]

A. At Portland.

Q. Where were you going?

A. To Berkeley, California.

Q. You had bills of lading in your rig?

A. Yes.

(Testimony of Chester A. Boyle.)

Q. Whose bills of lading were they?

A. Converse Trucking.

Q. Did you have a waybill manifest?

A. I suppose it was in the envelope with the other papers, yes.

Q. Now, Mr. Boyle, do you recall when it was that you left Portland?

A. Between twelve and one on the 13th.

Q. Were you alone? A. Yes.

Q. Did you have one of those sleeper arrangements or were you just all by yourself?

A. All by myself.

Q. Now as you left Portland what time did you get into Klamath Falls?

A. Approximately nine o'clock.

Q. What did you do at Klamath Falls?

A. I went to bed.

Q. Where did you stay, do you recall?

A. The Anchor Hotel.

Q. What time did you leave Klamath Falls the next morning? [40]

A. Approximately six o'clock.

Q. Now one other thing, Mr. Boyle. Perhaps you misunderstood me. You said you are employed by Converse at the present time? A. No, sir.

Q. By whom are you employed now?

A. Asbury Trucking.

Q. As you left Klamath Falls will you describe what the weather was when you got south of town?

A. It was patchy fog, very heavy in places and clear in places.

(Testimony of Chester A. Boyle.)

Q. Did the condition of patchy fog continue until the time of the accident?

A. No, it was clear in places.

Q. Perhaps you didn't understand me. Was it patchy and clear all the way to the accident?

A. Yes. The first patch was right here out of town and I hit another one on top of the hill, the hilltop out there, and another bunch before I had the accident.

Q. What was the weather condition at the time of the accident? A. Foggy.

Q. For how long a distance prior to the time that you went into the accident had it been foggy?

A. I would say approximately three-quarters of a mile.

Q. Will you tell us if you can how dense that fog was, if [41] it was dense?

A. Well, it was very dense, but I have no way of describing how dense.

Q. Did you have your lights on? A. Yes.

Q. How far could you see ahead of you that morning as you approached say within a quarter of a mile of the scene of the accident?

A. Oh, approximately 20 or 30 feet.

Q. As you approached the scene of the accident on which side of the road were you, Mr. Boyle?

A. On the right-hand side.

Q. Through what were you looking immediately prior to the accident?

A. I was looking out the window, had my head

(Testimony of Chester A. Boyle.)

out the window looking at the white line on the road.

Q. From your position there what could you see with reference to the white line? Could you see the white line with your head out the window?

A. Yes.

Q. Where was the truck with reference to the white line?

A. Probably ten or twelve inches from the white line at all times.

Q. On which side?

A. On the right-hand side.

Q. Do you recall talking to Mr. Lang, the man in the pink [42] shirt back here, after the accident?

A. I remember the face, but I don't remember whether I talked to him or not.

Q. Did you talk to a representative of Consolidated Freightways there?

A. I think so, yes.

Q. I will ask you this: Were you at any time as you approached the scene of the accident wiping off the exterior portion of your windshield?

A. No.

Q. Did you ever tell anybody that?

A. No.

Q. All right. Now about how fast were you going as you approached the scene of the accident?

A. Between 25 and 30.

Q. What was the first thing that you knew something was wrong?

(Testimony of Chester A. Boyle.)

A. When I noticed this set of headlights in front of me.

Q. About how far were they in front of you when you first saw them, if you know?

A. I would say approximately 20 feet. I don't know for sure.

Q. Where were they with reference to the front of your truck?

A. It looked like they was over the line, as far as I could tell. I couldn't tell exactly where they were at, but I [43] know they were close to me.

Q. What happened then?

A. The wreck happened right after I seen them.

Q. I take it there is no question and I think the photographs show that your truck went on south aways and over to the right, and the Consolidated rig flopped over north of where you came together?

A. Yes.

Q. All right. What did you do right after the accident?

A. I got out, stopped the motor, looked for some flares or fusees, but my cab was jumbled up so I couldn't find any. I ran down to the end of the ramp to stop other trucks I heard coming.

Q. Who was the first driver that approached from the south? A. Mr. Adams.

Q. Do you remember seeing him there?

A. Yes.

Q. Then did you ride with Mr. Cornelson back to the hospital afterwards?

A. Yes. Albert, I believe his name is.

(Testimony of Chester A. Boyle.)

Q. Do you recall his accusing you of being on the wrong side of the road?

A. I remember talking to him for a moment after the accident, but I don't remember just what—I identified myself and asked who the other driver was. [44]

Mr. Gearin: I have no further questions.

Cross-Examination

By Mr. Maxwell:

Q. Mr. Boyle, what kind of a load did you have on on this trip? A. Carbide, canned carbide.

Q. Do you know what the width of your equipment and load was?

A. Not exactly. Approximately 18 ton. I know I didn't have quite a full load.

Q. You left Klamath Falls about six o'clock in the morning? A. Yes, sir.

Q. And you hit patchy fog, as I understand it, right up to the overpass? A. Yes.

Q. You were familiar with that road, were you, Mr. Boyle? A. Yes.

Q. When did you start driving with your head out of the window?

A. When I got in the patchy fog right before the accident.

Q. How far back before the accident were you driving with your head out the window?

A. Oh, approximately a half a mile; between a half and three-quarters.

(Testimony of Chester A. Boyle.)

Q. And you were driving at a speed of around 30 miles an hour? [45] A. At that time, yes.

Q. And a speed of 25 to 30 miles an hour at the time of the accident? A. Yes.

Q. Did you receive any injuries in the accident, Mr. Boyle? A. Yes.

Q. What injuries did you receive?

A. I had my left hand mashed, crushed, and my left arm and also my left ankle.

Q. Where was your left arm?

A. It was laying in the window of the truck.

Q. You were driving with your right hand?

A. Yes.

Q. Just one hand? A. Yes.

Q. That had been for this whole half mile, approximately? A. Yes.

Q. Did you have a defroster on your truck, Mr. Boyle? A. No.

Q. Did you have any equipment for combating steam on your windshield? A. Yes.

Q. What did you have?

A. An electric fan.

Q. Was that operating at the time? [46]

A. No.

Q. Was the windshield steamed up?

A. No.

Q. But you were looking out of the window rather than through the windshield? A. Yes.

Q. Did I understand from your testimony that you were looking at the white line?

A. Yes, I was looking at the white line or yellow

(Testimony of Chester A. Boyle.)

line, or whatever they have up here. I have referred to it as a white line because they have them in California, but it was a yellow line.

Q. How many lines are there?

A. One up to the bridge, up to the overpass.

Q. As far as you recall, up to the point of the accident there was one yellow center line?

A. No, three lines on the overpass.

Q. And the accident did occur on the overpass?

A. Yes.

Q. As I understand it, you could only see 20 or 30 feet ahead of you? A. Yes.

Q. That had been true for this whole half a mile?

A. It was a little bit denser at the overpass than it was when you first went into it.

Q. You could only see 20 or 30 feet ahead of you when you [47] first saw the lights of the other vehicle? A. Yes.

Q. At that time your speed was 25 to 30 miles an hour? A. Yes.

Mr. Maxwell: I have no further questions.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Gearin: Mr. Maxwell, will you stipulate with me that the rig of Consolidated Freightways was approximately but not to exceed 60 feet in length and approximately but not to exceed 12 feet in height and approximately but not to exceed 8 feet

in width, and its total weight was approximately but not to exceed 76,000 pounds?

Mr. Maxwell: I don't know, but I will inquire, if I may have a moment, your Honor. I will so stipulate.

Mr. Gearin: Then the defendants rest, your Honor.

Mr. Maxwell: The plaintiff has no rebuttal, your Honor.

Mr. Gearin: I would like to take up a couple of legal questions for a few minutes, if I may, your Honor.

The Court: Yes.

(Short recess, during which the following occurred out of the presence and hearing of the jury.)

MOTION FOR DIRECTED VERDICT

Mr. Gearin: At this time, if the Court please, the defendant Sacramento Freight Lines, a corporation, and [48] Luisotta Brothers, a partnership, move the Court for an order directing the jury to return its verdict in their favor and against the plaintiff on the plaintiff's claim for damages on the ground and for the reason that there is no evidence that these moving defendants had any control or right to control the movements at that time. The pretrial order recites as an agreed statement that the tractor was owned by Luisotta Brothers and the trailer was owned by Sacramento Freight Lines, and that the tractor and trailer were being operated by defend-

ant Converse through his employee Mr. Boyle. It is not shown that this movement was a movement for or on behalf of Luisotta Brothers or Sacramento Freight lines. Mr. Boyle testified that he was working for Converse and that the bills of lading were those of Converse Trucking Company.

We have then, your Honor, the situation where the only reason for the moving defendants being in the case is because of the bare title to the equipment. Although it may raise a presumption, the presumption has been dispelled by the uncontradicted testimony of Mr. Boyle. There is no testimony that they were operating the truck and trailer at that time.

Mr. Maxwell: I am not certain that I quite understand counsel's motion. I am a little confused in my mind, your Honor. As I understand it, the motion was not for a dismissal [49] as to those defendants but was for a judgment in their favor against——

Mr. Gearin: No, the motion was for an order directing the jury to return a verdict in their favor and against the plaintiff on the plaintiff's claim as against them, because they were not responsible for the operation.

Mr. Maxwell: The motion, then, does not relate to the so-called counterclaim?

Mr. Gearin: No, I didn't intend it to be.

Mr. Maxwell: Under the circumstances I don't see any basis for resisting that motion, your Honor.

The Court: All right.

(Thereupon counsel for the respective parties argued the cause to the jury, and thereafter the Court instructed the jury as follows:)

INSTRUCTIONS TO THE JURY

The Court: Lady and gentlemen of the jury, you have heard all of the evidence and the arguments of counsel in this case which is now entitled Consolidated Freightways, Inc., a corporation, Plaintiff, vs. R. N. B. Converse, doing business as Converse Trucking Service; Sacramento Freight Lines, a corporation; Luisotta Brothers, a partnership, and Chester A. Boyle, Defendants.

The Court is now required to give you instructions on the law of the case. The questions of fact are solely for you. You make up your minds as to all the disputed questions of fact and also as to the credibility of the witnesses, because upon the credibility of the witnesses the facts themselves depend to a certain extent. That is solely committed to you.

However, the Court does have a function to outline the rules of law which are applicable in this case, and in this case they are extremely important.

The arguments of counsel, you will remember, are made by lawyers who are employed by the respective parties in the case, and you expect them, of course, to take a partisan approach. Each of them have been employed to represent a person, and it is their duty to present that side of the case as best it may be. So you may consider that in taking into consideration the arguments of counsel. But the facts themselves and the credibility of the witnesses are for your independent determination. Of course, you can follow counsel in any of the inferences or suggestions that counsel may make, but the arguments of

counsel are not evidence and they are not binding upon you. The evidence itself is and upon that basis you must decide the case.

Now the jurisdiction of this court has been established by allegations of diversity of citizenship, and the parties are agreed to certain facts which I will read you:

That on or about April 14th, 1954, on Highway 97 in [51] Klamath County, Oregon, at a point approximately five miles south of Klamath Falls, a collision occurred between a truck and trailer owned and operated by plaintiff Consolidated Freightways, which was proceeding northerly on said highway, and a certain Peterbilt tractor owned by Luisotta Brothers and a certain Trailmobile trailer owned by Sacramento Freightways; that the truck and trailer were operated by defendant Converse Trucking Company by its employee, Chester A. Boyle.

The damages are set out in the amount of damages agreed upon, and that will be submitted in the forms of verdict according to which way you decide this case, so you need pay no further attention to that.

Now, this case is a civil action for damages, and the respective parties are attempting to recover against the other, there being a counterclaim in this case—In going over these forms of verdict I don't seem to have any form of verdict on that side of the situation. Will you look these over, counsel?

Mr. Gearin: The forms we have here are three in number. May I explain the situation, your Honor?

The Court: That is all right, then. But there is a situation that has to be taken care of, isn't there, because you have now made an agreement——

Mr. Gearin: I didn't understand your [52] Honor.

The Court: There are certain defendants against whom in any event, as I understand it, there can't be any recovery.

Mr. Gearin: That is correct.

The Court: That is not taken care of in the verdicts. ?

Mr. Gearin: I am sorry. May I do it in long-hand, your Honor?

The Court: Yes, that is all right.

Mr. Gearin: I think I can rectify it if I may use a copy of the verdict.

The Court: Ladies and gentlemen, I will excuse you for just a moment until we find out just what this situation is.

(The jury was excused from the courtroom, and the following occurred out of the presence of the jury:)

The Court: As I understand the situation, you made a motion for a directed verdict on plaintiff's claim as against certain defendants.

Mr. Gearin: Yes, your Honor.

The Court: Now, the verdict reads against all defendants.

Mr. Gearin: I see the situation. I am going to try to rectify it now.

The Court: All you have to do is to caret in "against the defendants Converse Trucking Com-

pany and Chester Boyle," as I understand the situation. [53]

Mr. Gearin: All right. That would be fine.

The Court: That is all that is necessary. Put in the defendants Converse and Boyle.

(Thereupon the jury returned to the courtroom and the Court further instructed the jury as follows:)

The Court: Now we have settled this matter by a conference between counsel and the Court. The Court has already directed that if you find that the plaintiff, Consolidated Freightways, is entitled to recover in this case it could only recover against Converse and Boyle. It cannot recover against Sacramento Freight Lines, a corporation, and Luisotta Brothers, a partnership, even though it be found to be entitled to recover.

Now, there is a counterclaim in the case which is urged, on the other hand, by Sacramento Freight Lines and Luisotta Brothers because, though they were not managing the truck and trailer, if you find that the plaintiff Consolidated Freightways was guilty of negligence then, irrespective of the negligence of Converse, Luisotta and Sacramento would be entitled to recover if they prove that Consolidated was itself negligent.

That makes up the issue in the case, because the parties have agreed that the questions of fact which you are to determine are these: Were the defendants guilty of [54] negligence in any particular as charged by plaintiff—and that means Converse and Boyle—

and, if so, was such negligence a proximate cause of plaintiff's damage. Second, was the plaintiff guilty of negligence in one or more of the particulars charged by defendants and, if so, was that negligence a proximate cause of defendants' damage.

This case is based on negligence, but it is a peculiar situation in this case that all of the duties are laid down by statute, so if you find that one side or the other violated them that would be negligence in and of itself and would require nothing further, because the rules are laid down by statute.

Now, these are the statutes which are here involved, and you will see that these are controlling and fit exactly into this situation. The statute provides that no person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway, the hazards at intersections and any other conditions then existing.

The statute further provides that no person shall drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or to stop as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with the legal requirements and the duty of drivers and other parties using the highway [55] to exercise due care.

Further, the statute provides that upon all highways the driver of a vehicle shall drive on the right half of the highway except when (a) the right

half is out of repair and for that reason is impassable, or (b) when overtaking or passing another vehicle in accordance with the other provisions of the statute; and in driving upon the right half of a highway the driver shall drive as close as practicable to the right-hand edge or curb of the highway except when overtaking or passing another vehicle, or when placing a vehicle in a position to make a left turn.

The statute further provides the normal position of vehicles when a highway is divided into lanes. Whenever any street or highway has been divided into clearly marked lanes for traffic, the drivers of all vehicles shall obey the following regulations: A vehicle shall normally be driven in the lane nearest the right-hand edge or curb of the highway when the lane is available, except when overtaking another vehicle or in preparation for making a left turn. A vehicle shall be driven as nearly as practicable within a single lane and shall not be moved from such lane until the driver has ascertained that such movement can be made in safety.

Now, a violation by either of these drivers of the vehicles of the provisions of these statutes which have just been read to you constitutes negligence in and of itself, and that would establish negligence, if you find it was violated, either on one side or the other. So that lays down a very, very positive rule on the subject, since each of these parties contend negligence on the other side on practically the same basis, namely, that the other failed to keep any or a proper lookout, or to keep the vehicle under any

or proper control; that they operated the vehicles at speeds greater than was reasonable and prudent under the circumstances then and there existing; that they failed to operate the vehicles in the right-hand half of the main traveled portion of the highway, although said portion of the highway was unobstructed and available for use; that the vehicle was operated in more than one lane of a two-lane highway; that said vehicles were allowed to cross the center line of said highway and encroach upon the left-hand half thereof when the same was occupied by the vehicle of the other party; and that they failed to yield the right-of-way to the vehicle of the other party.

Those charges are made equally on each side, and you have the situation before you. You have heard all of the evidence in the case. It is purely a question of fact for you to determine.

Of course, the salient point about the thing is that it is a question of on which side of the highway were the vehicles when the accident occurred. If you determine that point you can make up your minds pretty generally [57] primarily what the situation is, because there is one thing certain about this: That some vehicle was on the wrong side. So the first thing you have to make up your minds on is which one it was. I can't give you any guides on that. That is a pure question of fact. The credibility of the witnesses does enter into that situation.

As I said before, on the question of damage, if you find that there was, that is set out in the ver-

dicts, so you do not need to worry about that. It is according to which side you have decided for. The amounts of damage are stated in the verdicts, and they are right there.

Then suppose you find that both sides were negligent in the particulars set up by the other side, namely, in one of the statutory provisions or the other, then you must decide for the defendants. If they both violated a statutory duty then you must decide for the defendants.

Before either one side or the other can recover they must prove their charge of negligence by a preponderance of the evidence. "Preponderance of the evidence" sounds mysterious, but it really isn't. It simply means by the greater weight of the evidence, better evidence, that which is more convincing to your minds than the type of evidence produced by the other side. As I say, there again the credibility that you give these witnesses comes right squarely to the forefront.

The rule is that you are the sole and exclusive judges [58] of the facts in the case and the credibility of all witnesses. Your power of judging the evidence is not arbitrary but must be exercised always with legal discretion and in accordance with the rules of evidence.

You are not bound to return a verdict in accordance with the statements of any number of witnesses which you do not believe as against the testimony of other witnesses to whom you give full credit and belief or against other evidence which you do believe or against an inference therefrom.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which he testifies, by the character of his testimony, or by other factors which weaken his power of observation, or may be overcome by other evidence or contradictory evidence or by testimony affecting his character or motives.

Now it is true that a witness may be mistaken in some part of his testimony and that does not necessarily affect his credibility at all. But if he testifies falsely in any material part of his testimony, of course, you may then look with suspicion upon other things that he has testified to, and if you find that he has testified wilfully false then you would be entirely at liberty to disregard all the other testimony that he has given except as you are convinced by other testimony which corroborates it.

Of course, in that regard the physical [59] evidence that you have as to the highway and the positions of the vehicles and the pictures may all be used. That really constitutes indirect evidence. Direct evidence is the testimony of an eyewitness, and as such is rarely available. Indirect evidence is the proof of facts or circumstances surrounding an issue of fact which tends to establish the contention of one or the other of the parties. Of course, physical evidence is something you can use, or indirect evidence is something that you can use, and sometimes it is more convincing than the direct evidence of an eyewitness, because when physical evidence speaks to you in such terms then it might be that you could decide the case upon that, together with all the other evi-

dence in the case. So physical evidence is very important. But it is not controlling and must be weighed with all the other elements in the case. And that is the situation you have here, because you have considerable physical indirect evidence in this case. And there again it is your duty to appraise that, find out what these physical circumstances mean and what inferences you think logically can be drawn from them.

Now in this case the plaintiff, in the first place, in order to be entitled to recover must prove the negligence of the defendants Converse and Boyle by a preponderance of the evidence. On the other hand, if it fails and you find that the defendants have not proved by a preponderance of [60] the evidence that Consolidated itself was guilty of negligence in the particulars charged then you would find a verdict for the defendants. If, on the other hand, you find that the defendants have proved that the plaintiff was negligent, thereupon they would be entitled to recover; that is, in that event Sacramento Freight Company and Luisotta Brothers would be entitled to recover upon their counterclaim without any attention being paid to the supposed negligence of Converse or Boyle. Therefore, you have kind of a three-cornered proposition, but I think that the situation is sufficiently clear so that you can determine this question between the parties.

You will now be excused for a few minutes while I take up some questions of law.

Mr. Gearin: Your Honor, Mr. Maxwell and I

have agreed that will not be necessary. There will be no objection by either party.

The Court: Ladies and gentlemen, then you will have with you in the juryroom the exhibits which have been introduced in the case and the forms of verdict, which are three in number.

If you find that the plaintiff has not proved the charges of negligence against Converse and Boyle, then you will use this form of verdict: "We, the jury duly impaneled and sworn to try the above-entitled cause, do find [61] our verdict in favor of defendants and against the plaintiff." If, on the other hand, you find that the defendants Sacramento Freight Lines and Luisotta have proved that the plaintiff Consolidated Freightways were negligent, then you will use this form of verdict: We, the jury duly impaneled and sworn to try the above-entitled cause, do find our verdict against plaintiff and in favor of defendants Sacramento Freight Lines and Luisotta Brothers and assess defendants' damages in the sum of \$10,483.86.

On the other hand, if you find that the plaintiff has proved that the defendants Converse and Boyle were negligent, and it is not proved that Consolidated Freightways itself was negligent, then you will use this form of verdict: We, the jury duly impaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff and against the defendants Converse and Boyle and assess plaintiffs' damages at \$10,160.45. Dated at Klamath Falls, Oregon, this blank day of blank, 1955.

In each of these verdicts there is a blank line for the foreman to sign, and whichever one you use out of the three—and you can only use one—will be signed by the foreman alone. You must remember that this is not like a case in the state court. You are here in the federal court and you must all agree to any verdict that is returned, whatever it is. You all must unanimously agree.

Swear the bailiff. [62]

(Baliffs were thereupon sworn, and the jury retired to consider of its verdict.)

(Whereupon proceedings in the above matter on said day were concluded.) [63]

Reporter's Certificate

I, John S. Beckwith, an Official Court Reporter of the above-entitled court, hereby certify that I reported in shorthand the testimony and proceedings had upon the trial of the above-entitled cause on August 4 and 5, 1955; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, and the foregoing transcript, pages 1 to 63, both inclusive, constitutes a full, true and correct transcript of the testimony and proceedings so taken by me in shorthand on said dates, as aforesaid.

Witness my hand as Official Court Reporter at Portland, Oregon, this 19th day of September, 1955.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed October 18, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

- 5/13/54—Filed petition for removal from Klamath County.
- 5/13/54—Filed bond on removal.
- 5/13/54—Filed notice of removal.
- 5/18/54—Filed answer of defts Converse Trucking Service etc., et al.
- 5/18/54—Filed interrogatories submitted to plaintiff by deft. Converse Trucking Service.
- 5/22/54—Filed demand of plaintiff for jury trial.
- 5/22/54—Filed motion of plaintiff for trial, etc., in Klamath Falls.
- 5/24/54—Filed and entered order transferring proceedings to Klamath Falls Term.
- 8/ 4/54—Klamath Falls: Filed and entered pre-trial order.
- 8/ 4/54—Klamath Falls: Record of empaneling jury and trial.
- 8/ 5/54—Klamath Falls: Filed stipulation re use of depositions.
- 8/ 5/54—Klamath Falls: Filed verdict.
- 8/ 5/54—Klamath Falls: Filed plaintiff's exhibits 2a to h.
- 8/ 5/54—Entered judgment for plaintiff against defendants R. N. Converse and Chester Boyle for \$10,160.45 and costs.
- 8/17/54—Filed above judgment.
- 8/17/54—Filed cost bill.
- 8/17/54—Entered judgment in lien docket.

8/17/54—Filed objections to cost bill.

8/19/54—Filed notice to tax costs.

8/30/54—Filed notice of appeal by Converse
Trucking Service and Chester A. Boyle.

9/ 6/54—Filed amended notice of appeal.

10/ 3/54—Filed supersedeas bond on appeal.

10/ 5/54—Filed designation of contents of record
on appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for removal; Bond on removal; Notice of removal; Interrogatories submitted to plaintiff by defendant Converse Trucking Service; Answer of defendants Converse Trucking Service, impleaded as Converse Trucking Co., et al.; Plaintiffs' demand for jury trial; Plaintiffs' motion for trial and hearing of all preliminary matters at Klamath Falls, Oregon; Order granting motion for hearings at Klamath Falls, Oregon; Record of empaneling jury; Pre-trial order; Stipulation re depositions; Verdict; Judgment; Bill of costs; Notice of taxing costs; Objections to cost bill; Notice of appeal; Amended notice of appeal; Supersedeas bond; Designation of contents of record on appeal and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein num-

bered Civil 7493, in which R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle are the defendants and appellants and Consolidated Freightways, Inc., a corporation, is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the costs of filing the notice of appeal, \$5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 6th day of October, 1955.

[Seal]

R. DE MOTT,

Clerk;

By /s/ F. L. BUCK,

Chief Deputy.

[Endorsed]: No. 14900. United States Court of Appeals for the Ninth Circuit. R. N. B. Converse, doing business as Converse Trucking Service, and Chester A. Boyle, Appellants, vs. Consolidated Freightways, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed October 14, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 14900

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,

Appellee,

vs.

R. N. B. CONVERSE, d/b/a CONVERSE
TRUCKING SERVICE, a Corporation; SAC-
RAMENTO FREIGHT LINES, a Corpora-
tion; LOUISOTTI BROTHERS, a Partner-
ship, and CHESTER A. BOYLE,

Appellants.

STATEMENT OF POINTS
TO BE RELIED UPON

Come now appellants, R. N. B. Converse, d/b/a
Converse Trucking Service and Chester A. Boyle,
pursuant to Rule 17 of this court, and state that the
following point will be relied upon by said appel-
lants upon this appeal:

(1) The verdict was against the weight of the
evidence.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

By /s/ JOHN GORDON GEARIN,
Attorneys for Appellants, R. N. B. Converse, d/b/a
Converse Trucking Service, and Chester A.
Boyle.

[Endorsed]: Filed November 29, 1955.

